No. 92-1223

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The FLRA argues (Br. 23) that "[i]t is senseless" to decline to weigh collective bargaining interests in the FOIA disclosure balance. As an initial matter, however, the statutory language compels that approach. Moreover, it leads to a sensible result that protects privacy interests in this case.

1. In 5 U.S.C. 7114(b)(4), the Labor Statute calls for the disclosure of information to unions, but only "to the extent not prohibited by law." The FLRA acknowledges (Br. 19) that "[t]his general reference brings the Privacy Act into Section 7114(b)(4) analysis," and that "[t]he Privacy Act's bar to unconsented disclosure of personal data would apply here, unless an exception to that general rule applies." That is

what Congress must have intended when it enacted Section 7114(b)(4) in 1978, since it was entirely foreseeable that the Privacy Act of 1974 would bar the release of some information that unions might find useful. Congress nevertheless authorized the release of information under the Labor Statute only to the extent that release would be permitted under the Privacy Act.[1]

The further conclusion that collective bargaining interests are not relevant under the Privacy Act is compelled by the text of the Privacy Act, which contains no exception providing for the release of information that fosters collective bargaining. The only exception to the Privacy Act relied on by the respondents in this case is Exception (b)(2), 5 U.S.C. 552a(b)(2), which authorizes disclosures "required under" FOIA. And like the Privacy Act, FOIA does

[1] The AFGE suggests (Br. 7) that Congress was focusing on statutes prohibiting disclosure in "*unequivocal terms*," such as 42 U.S.C. 2165, 2167, and 2168 (atomic energy information), 13 U.S.C. 8(b), 9(a) (census data), and Fed. R. Crim. P. 6(e) (grand jury records), rather than statutes such as the Privacy Act that have exceptions that call for the weighing of specified interests. But it would be unusual for a union to contend that grand jury information, census data, or atomic energy information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" under Section 7114(b)(4)(B), whereas personal information about employees would be relevant in many cases. Accordingly, it seems far more likely that Congress was thinking of the Privacy Act than the statutes listed by the AFGE when it authorized disclosure under Section 7114(b)(4) only "to the extent not prohibited by law." In any event, Congress made no distinction in the Labor Statute between statutes posing "unequivocal" bars and statutes that permit disclosure in some circumstances.

not authorize consideration of collective bargaining interests. To the contrary, as this Court held in *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989), FOIA authorizes the disclosure of information that reveals what the government is "up to," and does not authorize "disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." Accordingly, "[o]nce placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public." *FLRA* v. *Department of Treasury*, 884 F.2d 1446, 1457 (D.C. Cir. 1989) (R. Ginsburg, J., concurring), cert. denied, 493 U.S. 1055 (1990).

For the same reason, contrary to the FLRA's contention (Br. 30), *Reporters Committee* is not distinguishable on the ground that the request for information in that case "was made directly under the FOIA itself, while the data requests in the instant case were made under Section 7114(b)(4) of the Labor Statute." The request here ultimately arises "wholly within the FOIA's domain," as Judge Ginsburg put it, 884 F.2d at 1457, and FOIA does not call for consideration of collective bargaining interests. To the contrary, as *Reporters Committee* makes clear, FOIA provides for the disclosure of information that reveals what the government is up to (if the interest in disclosing what the government is up to outweighs the privacy interest at stake).[2]

[2] The FLRA also suggests (Br. 32-33) that *Reporters Committee* is distinguishable because it involved FOIA Exemption 7(C), while this case involves Exemption 6. But like the court

The FLRA notes (Br. 31) that certain FOIA provisions, such as its jurisdictional and attorney's fees provisions, are not applicable here, and contends on that basis that the FOIA test must be adapted to include consideration of collective bargaining interests when a request for information is made by a union. That conclusion does not follow. The Privacy Act permits disclosures "required under" FOIA, 5 U.S.C. 552a(b)(2), thus authorizing disclosure where the substantive standards of FOIA call for disclosure. But the Privacy Act does not incorporate FOIA's procedural requirements. Accordingly, the question here is whether the names and home addressess that the unions have requested are disclosable under FOIA Exemption 6, not whether the unions have complied with FOIA's procedural requirements.

Although the thrust of the argument in the FLRA's brief is that collective bargaining interests must be weighed in the FOIA balance, the FLRA also contends that disclosure is warranted under a "derivative use" theory. That is, the FLRA argues in the alternative (Br. 46 n.24) that the home addresses of federal employees should be released to the general public because that will permit "any person interested in learning about operation of the subject agencies to question employees at home and obtain more candid information about agency operations

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of appeals, the FLRA fails to explain how any difference between Exemption 6 and Exemption 7(C) is relevant to the dispute in this case. Moreover, in *Department of State* v. *Ray*, 112 S. Ct. 541, 549 (1991), an Exemption 6 case, this Court applied *Reporters Committee* in concluding that the sort of information that is disclosable under FOIA is information that tells what the government is "up to."

than if the employee were contacted at work." As an initial matter, that argument was not a ground for the FLRA's decisions in these cases, and therefore does not provide a basis for affirmance by this Court. See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). In any event, the FLRA's derivative use approach has no merit. "Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy." *Department of State* v. *Ray*, 112 S. Ct. 541, 549 (1991). In this case, the public benefits to be derived from derivative uses of federal employees' home addresses are entirely hypothetical, while the invasion of privacy that would result from the disclosure of home addresses to the general public—which may include commercial opportunists, disgruntled persons, persistent job seekers, etc.—is real and substantial. Moreover, as the Second Circuit stated, "[c]ompelling disclosure of personal information, that has no relationship to an agency's activities, on so attenuated a basis would inevitably result in the disclosure of virtually all personal information, thereby effectively eviscerating the protections of privacy provided by Exemption 6." *FLRA* v. *Department of Veterans Affairs*, 958 F.2d 503, 512 (1992).

2. The FLRA acknowledges (Br. 41) "that employees have some privacy interest in their home addresses." Accordingly, if, as we contend, there is no cognizable interest in disclosing employees' home addresses, the resolution of the balancing required under FOIA Exemption 6 is straightforward. As the court of appeals stated, "if one applies the restrictions announced in *Reporters' Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited." Pet. App. 19a.

As we have shown, there is no basis for distinguishing *Reporters Committee*. Nor is there any reason to reconsider it. The contentions of the FLRA and the unions about the dire consequences that will flow from withholding employees' home addresses and other personal information are greatly exaggerated.

As an initial matter, the FLRA and the unions underestimate the extent of the invasion of privacy that may be caused by the disclosure of home addresses. The AFGE states (Br. 13) that the intrusion caused by unwanted mailings is relatively limited since employees may deposit them in the garbage. But a home address is also helpful in identifying a home telephone number, and it is not as easy to get rid of an unwanted caller as it is to get rid of an unwanted letter. And a home address also makes a home visit possible, even if the employee has an unlisted telephone number. Furthermore, as the FLRA acknowledged in its *Portsmouth* decision, *United States Department of the Navy, Portsmouth Naval Shipyard*, 37 F.L.R.A. 515, 533, (1990), application for enforcement denied and cross-petition for review granted *sub nom. FLRA* v. *Department of the Navy*, 941 F.2d 49 (1st Cir. 1991) there is no reason why a union cannot sell a list of names and home addresses of federal employees to entrepreneurs and fund-raisers, thus multiplying the number of unwanted letters, callers, and visitors.[3] In light of the

[3] The Privacy Act provides for various remedies, including damages, from an agency that releases information that should not be disclosed. See 5 U.S.C. 552a(g). But there is no provision in the Privacy Act for obtaining relief from a private party, such as a union, in such circumstances. Indeed, there appears to be no avenue for employees to obtain adequate relief from a union that makes unauthorized disclosures. See *FLRA* v. *United States Dep't of Defense*, 977 F.2d 545, 549 n.6 (11th Cir. 1992).

consequences that are likely to follow from the disclosure of a home address, those employees who have declined to give their home addresses to unions would surely disagree with the FLRA's assertion (Br. 41) that they have a "minimal" interest in protecting their home addresses from compulsory disclosure. "Even today, when sophisticated mail and telephone marketing techniques have rendered most homes an easy mark for an astonishing variety of unwanted sales pitches, opinion polls, and other solicitations, the fundamental principle that a person has a right to keep out unwanted intruders 'has lost none of its vitality.'" *FLRA* v. *United States Dep't of Navy, Navy Ships Parts Control Center*, 966 F.2d 747, 771 (3d Cir. 1992) (Rosenn, J., dissenting).

The FLRA's disregard of privacy interests was evident in its decision in the *Portsmouth* case, in which the FLRA announced its general policy of ordering the release of employees' home addresses. The FLRA recognized that federal unions may contact employees at work, but decided that home contact is preferable because "[i]n the home environment, the employee has the leisure *and the privacy* to give the full and thoughtful attention to the union's message that the workplace generally does not permit." 37 F.L.R.A. at 532 (emphasis added). Thus, the FLRA recognized that federal employees enjoy the privacy of their homes, and concluded *for that reason* to turn employees' home addresses over to unions. We submit, to the contrary, that recognition of the fact that federal employees enjoy the privacy of

their homes should have led the FLRA to respect that right to privacy.

On the other hand, as the AFGE paraphrases a point made in our opening brief (at 10-11 n.6), "the only union interest in disclosure of employee addresses is its interest in the addresses of those who have consciously chosen not to become union members and, out of privacy concerns, not to otherwise give the union their addresses." That is, the unions have the home addresses of their members and may ask other members of the bargaining unit for their home addresses, so the only reason for additional disclosure in these cases is to override the choices of federal employees who do not want to disclose their home addresses to unions. The AFGE claims (Br. 11 n.6) in response that new employees, "if not subject to union mailings," may decline to provide their home addresses more as "a function of unfamiliarity with the union and its services (or simply inertia) than a function of some conscious privacy-based choice."[4] But it remains the fact that unions may contact new employees at work and familiarize them with their services, and ask for their home addresses. Unions will then have the home addresses of all members of the bargaining unit except those who do not want to disclose them. Ordering the disclosure of the home addresses of employees who have declined to provide them is contrary to the principle, recognized by this Court in *Reporters Committee*, 489 U.S. at 763, that

[4] The NTEU has a similar view of those federal employees who do not provide it with their home addresses. It claims (Amicus Br. 13) that they "most often are simply ignorant of the union's existence or services, are apathetic, or are disinclined to pay dues."

the right to control the dissemination of personal information is central to the right embodied in the Privacy Act.

At the same time, the only benefit of compulsory disclosure of home addresses is whatever marginal benefit results from contacting employees at home when they prefer to be contacted at work, since it is not difficult, either as a general matter or with respect to the employees affected by these cases, for the unions to contact federal employees at work. The AFGE merely asserts (Br. 10 n.5) that it prefers not "to rely on worksite contacts as the principal means for establishing communication with employees." But as the First Circuit stated, "where, as here, * * * contact may easily be made at the workplace," any problem with arranging further communications "may be addressed by making mutually agreeable arrangements to meet or speak elsewhere." *FLRA* v. *United States Dep't of Navy, Naval Communications*, 941 F.2d 49, 57 (1st Cir. 1991).

Moreover, federal unions have an avenue for assuring contact with employees that is not available to private sector unions. In the private sector, if a matter is negotiable, that just means that the employer must bargain in good faith about it—so an employer need not give in to a request for additional worksite contact and may extract a *quid pro quo* if it agrees to permit additional worksite contact. In the federal sector, in contrast, if a proposal concerns a negotiable topic, the Federal Service Impasses Panel may impose the proposal on an agency over its objection. See 5 U.S.C. 7119(c)(5). Each of the briefs supporting affirmance has ignored this difference between the private sector and the federal sector, even though it is discussed in our opening brief (at 28-

29). Thus, in an unusual circumstance where it really has been difficult to contact employees at work, a union could obtain a means of ensuring that union letters or other communications reach members of the bargaining unit. Indeed, it is common practice for unions and federal agencies to negotiate over proposals to contact employees at work. See, *e.g.*, *United States Dep't of HHS* v. *FLRA*, 976 F.2d 229, 231 (4th Cir. 1992). Moreover, in each of these cases the title, grade, and work location of all bargaining unit employees were released, C.A. App. 58, 60, 113, and there has been no showing that local union representatives have been unable to contact and communicate with members of the bargaining unit at work.

Beyond home addresses, the only item of information that is at issue here, the FLRA contends that unions need "a wide array of personal data concerning individual employees" (Br. 33-34), and argues that the impact on federal sector labor relations of reading the Privacy Act to protect personal information about federal employees "is obvious and grave" (Br. 35). As is the case with respect to home addresses, we submit that the significance of any detrimental impact on the collective bargaining process resulting from the nondisclosure of other sorts of personal information will largely dissipate upon examination, particularly since personal information is available to unions in three ways. First, the Privacy Act does not prohibit the release of personal information where the individual to whom the information pertains consents to its release. See 5 U.S.C. 552a(b). Second, as we explain in our opening brief (at 27), it is often possible to provide redacted information that both protects individual privacy and gives the union the information it needs. And third, the Privacy Act authorizes disclo-

sures pursuant to "routine use" regulations, and the Office of Personnel Management has promulgated a routine use regulation authorizing the release of various sorts of information to unions, see 49 Fed. Reg. 36,949, 36,956 (1984), where the information is to be used "for a purpose which is compatible with the purpose for which it was collected," 5 U.S.C. 552a(a)(7).[5]

Contrary to the AFGE's claim (Br. 23), the routine use exception to the Privacy Act, 5 U.S.C. 552a(b)(3), does not authorize agency management to violate the privacy rights of federal employees. The Privacy Act establishes both procedural restrictions on disclosures pursuant to routine use regulations, 5 U.S.C. 552a(e)(4)(D), and the substantive requirement that the information must be used for a purpose that is compatible with the purpose for which it was collected. See *Britt* v. *Naval Investigative Service*, 886 F.2d 544, 547-550 (3d Cir. 1989) (Navy erred by disclosing investigative records to the INS). The AFGE's real complaint appears to be that Congress has lodged authority over routine use regulations primarily with OPM rather than the FLRA. But by

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[5] OPM's routine use regulation, which applies to most federal agencies, does not apply to military exchange services such as those involved in this case. See 5 U.S.C. 2105. But the AFGE errs in stating (Br. 23) that "no other 'routine use' regulation has been promulgated to give exclusive representatives of the employees of these agencies *any access whatsoever* to personnel information." The Navy Exchanges have promulgated a regulation providing for the release of information "[t]o officials of labor organizations recognized under the Civil Service Reform Act when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices and matters affecting working conditions." 58 Fed. Reg. 10,824 (1993).

placing primary authority with OPM rather than a specialized agency that is focused on labor relations, Congress helped to "ensure that the disclosure provisions of the Labor-Management Relations Act do not trump the more important policy objectives of the Privacy Act." *FLRA* v. *Department of Veterans Affairs*, 958 F.2d at 513.

3. The FLRA recognizes (Br. 38) that the Privacy Act applies to federal employees, but not to private sector employees. The FLRA nevertheless makes the extraordinary claim (*ibid.*) that "federal employees have even less reason to expect a privacy interest as to work-related personal information than do private employees." See also NTEU Amicus Br. 18 ("[t]he government identifies nothing in the Privacy Act or its legislative history to show any consideration of federal employee privacy"). That premise appears to have guided the FLRA in deciding these cases and the related cases in which it has ordered the release of various sorts of personnel files. See, *e.g.*, *Department of Labor* v. *FLRA*, 39 F.L.R.A. 531 (1991), remanded on other grounds, No. 91-1174 (D.C. Cir. Order of Jan. 7, 1992) (unredacted suspension records); *FLRA* v. *Department of Commerce*, 38 F.L.R.A. 120 (1990), rev'd, 962 F.2d 1055 (D.C. Cir. 1992) (names and duty stations of employees receiving outstanding or commendable ratings); *Department of HHS* v. *FLRA*, 43 F.L.R.A. 164 (1991), rev'd, No. 92-1012 (D.C. Cir. Dec. 10, 1992) (unsanitized performance appraisals); see also *Department of Energy* v. *FLRA*, 41 F.L.R.A. 1241 (1991), appeal pending, No. 91-1514 (D.C. Cir.) (requiring bargaining over the release of unsanitized notices stating that an agency suspects that a particular employee is abusing drugs). But the FLRA's premise is erroneous: the Privacy

Act is built into Section 7114(b)(4) of the Labor Statute, which authorizes disclosures to unions only "to the extent not prohibited by law," and no exception to the Privacy Act authorizes disclosures that promote collective bargaining interests. As the D.C. Circuit held, the FLRA engaged in an "imaginative reconstruction" of the relevant statutes by reading collective bargaining interests into the FOIA balance and holding that they outweigh the privacy interests of federal employees. *FLRA* v. *Department of Treasury*, 884 F.2d at 1453. Fidelity to Congress's enactments precludes such a "reconstruction."

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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